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March 15, 2006

VIA ELECTRONIC AND FIRST-CLASS MAIL SERVICE
The Honorable Charles L.A. Terreni
Chief Clerk
South Carolina Public Service Commission
PO Drawer 11649
Columbia SC 29211

RE: Application of Total Environmental Solutions, Inc. for Rate Relief
Docket No. 2004-90-W/S, ELS File No. 557-10022

Dear Charlie:

Enclosed for filing please find and original and ten copies of the **Brief of Total Environmental Solutions, Inc. and Proposed Order of Total Environmental Solutions, Inc.** for filing in the above-referenced docket. By copy of this letter, I am serving all parties of record in this proceeding and enclose my certificate of service to that effect.

Please stamp "received" the additional copy of this letter, and return with the bearer of these documents.

With kind regards, I am

Yours truly,

John F. Beach

JB/cr
cc: Mr. Paul Maeder [via electronic and first-class mail service]
Mr. Gary Shambaugh [via electronic and first-class mail service]
Mr. Bill Schoening [via electronic and first-class mail service]
All parties of record [via electronic and first-class mail service]

STATE OF SOUTH CAROLINA
BEFORE THE PUBLIC SERVICE COMMISSION
DOCKET NO. 2004-90-W/S

IN THE MATTER OF:	)	
	)	
Total Environmental Solutions, Inc.	)	**CERTIFICATE OF SERVICE**
Application for Increase in Rates and	)	
Charges for Water and Sewer Services	)	
	)	

This is to certify that I have caused to be served this day, one (1) copy of the **Brief of Total Environmental Solutions, Inc. and Proposed Order of Total Environmental Solutions, Inc.** via electronic mail and by placing a copy of same in the care and custody of the United States Postal Service, with proper first-class postage affixed hereto and addressed as follows:

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Carol Roof

Columbia, South Carolina
March 15, 2006

STATE OF SOUTH CAROLINA
BEFORE THE PUBLIC SERVICE COMMISSION
DOCKET NO. 2004-90-W/S

IN THE MATTER OF:	)	
	)	
Total Environmental Solutions, Inc.	)	**BRIEF OF TOTAL.**
Application for Increase in Rates and	)	**ENVIRONMENTAL**
Charges for Water and Sewer Services	)	**SOLUTIONS, INC**
	)	

This matter is before the Commission on remand, pursuant to Judge James R. Barber, III's October 25, 2005 Amended Order Ruling on Appeal of Public Service Commission Decisions. Total Environmental Solutions, Inc. (TESI") files this brief in support of this position, and in response to the Commission's order dated February 8, 2006.

I. Procedural History

This matter is part of the rate case that Total Environmental Solutions, Inc. ("TESI ") originally filed in March, 2004. In September, 2004 the Commission issued an order granting TESI's request for a rate increase. *Order No. 2004-434* ("*Main Order*"). When the Commission applied the rates TESI had requested to the Staff's as-adjusted test year operating expenses, the requested rates would have resulted in an operating margin of 28.68%. The Commission found that this 28.68% operating margin was excessive and, instead, ruled:

> an ultimate fair operating margin that the company should have an opportunity to earn is 20.00%.

Main Order, p. 5.

The Commission determined that the necessary annual revenues resulting from the fair and reasonable operating margin would be $609,624. After viewing all the evidence in this proceeding, the Commission expressly found that the 20% operating margin and corresponding annual revenues were ultimately "fair" *Main Order*, pp.5, 29, 34; "appropriate" *Id.*, pp. 34, 35; "required" *Id.*, pp. 5, 30, 34, 35; needed for TESI to be "viable" *Id.*, p. 29; "reasonable and fair" *Id.*, p. 30; "fair and reasonable" *Id.*, p. 34; "reasonable" *Id.*, p. 34; and "just and reasonable" *Id.*, p. 35. The Commission determined to soften the impact of this increase on

Foxwood customers by phasing in the "required" revenues and operating margin over 24 months. *Id.*, p. 5. Pursuant to this finding, TESI would not begin to earn its necessary annual revenues and operating margin until September 17, 2006.

TESI petitioned for reconsideration on a number of issues, including TESI's contention that it was inappropriate for the Commission to phase the required revenues and operating margin in over a 24-month period. The Foxwood Hills Property Owners Association ("POA") also petitioned for reconsideration, solely contesting how the Commission allowed the utility to charge a customer who disconnects and then reconnects service within ten months.

The POA did not contest the Commission's conclusions regarding TESI's fair operating margin or required annual revenues. The POA also did not contest the Commission's determination that TESI was entitled to begin earning this 20% operating margin and associated annual revenues on September 17, 2006.

The Commission denied the parties' Petitions for Reconsideration, except for TESI's request that the Commission change its accounting treatment of enhancement fee revenue.

On January 14, 2005, the Commission issued *Order No. 2004-574. ("Order on Reconsideration")* In that Order the Commission reaffirmed all findings and conclusions of the *Main Order*, which included all of its conclusions regarding the 20% operating margin and corresponding annual revenues. *Order on Reconsideration*, p. 8. The Commission recalculated the rates based on the new accounting treatment for enhancement fees, and increased TESI's ultimate annual revenue requirement from $609,624 to $621,424. *Id.*, p. 7. The Commission restated the implementation schedule so that TESI would have the opportunity to begin earning its operating margin and required annual revenue on December 1, 2006.

TESI appealed the Commission's Orders on several grounds, including that the Commission made an error in phasing in TESI's "fair and reasonable" rates over a 24-month period. TESI specifically requested that an appellate court require the Commission to immediately implement the 20% operating margin and $621,424 annual revenues as reflected by the Phase 3 rates. The POA did not appeal any aspect of the Commission's orders.

TESI chose not to place higher rates into effect under bond pending this appeal, and continued to operate under the Commission's Phase 1 rates.

On September 27, 2005, the Circuit Court granted TESI's appeal on the ground that the Commission erred in phasing TESI's ultimate rate increase in over a 24-month period. The

Circuit Court denied the remaining grounds for appeal. The Court remanded the case for the Commission to provide TESI with its fair and reasonable rates in a single, non-phased manner. The Court rejected TESI's request that it expressly require the Commission to immediately place the exact Phase 3 rates into effect.

In reviewing the Court's initial remand order issued in September, TESI was concerned the Commission might incorrectly conclude that the Circuit Court had reviewed and reversed the Commission's clear findings on fair operating margin and required annual revenue. TESI filed a Motion to Alter or Amend Judgment requesting that the Court clarify this point. The Circuit Court granted TESI's Motion, and amended its remand Order by adding the following clarifying language: "This court makes no finding as to what an appropriate operating margin should be." *Amended Order*, p. 9.

II. Legal Discussion

A. The Law of the Case doctrine bars any change of the Commission's previous findings and conclusions on TESI's fair and reasonable operating margin and required annual revenue.

The Commission must, as a matter of law, now approve rates that provide TESI the opportunity to earn its 20% operating margin and $621,424 annual revenues. The POA did not challenge the Commission's initial findings and conclusions on these issues through either a motion for reconsideration or an appeal. These Commission findings and conclusion were therefore not before the Circuit Court for review on appeal, and are not now before the Commission on remand.

The recent case of *Brunson v. American Koyo Bearings*, 367 S.C. 161, 623 S.E.2d 870 (Ct. App. 2005) ("*Brunson*") is dispositive. In that case, a single commissioner for the South Carolina Worker's Compensation Commission made several determinations on a claim, including that Claimant's contact dermatitis was a compensable work-related injury. Employer appealed several of the Commissioner's findings to the full Commission, but did not appeal the compensability of the contact dermatitis. The full Commission reversed the single Commissioner and issued an order generally remanding the case for a *de novo* hearing. The Claimant filed an interlocutory appeal contending, among other things, that the remand for *de*

novo hearing improperly reopened all issues to be relitigated, including the issue of compensability of the contact dermatitis, which had never been appealed.

The Court of Appeals ruled that the full Commission's authority on appeal was restricted, "by operation of law," to only those issues that were expressly appealed, and that the single Commissioner's authority on remand was similarly restricted. *Id.*, 367 S.C. 161, 623 S.E.2d 870, 872. The Court held that since no party had appealed the initial finding that the contact dermatitis was compensable, that finding was the "law of the case," and could not either be altered by the full Commission on appeal, or relitigated before the single Commissioner on remand. *Id.*

The present case is materially identical to *Brunson* on the issue at hand. In the TESI rate proceeding, no party appealed the Commission's primary findings regarding the operating margin that was fair and reasonable or the annual revenues that were required for TESI's operations. These findings were therefore, by operation of law, neither before the Circuit Court on appeal, nor now before the Commission on remand. *Brunson* holds, therefore, that, *regardless of the Circuit Court's ruling*, the Commission's primary findings and conclusions are the law of the case, and cannot now be relitigated by the parties or altered by the Commission.

The Circuit Court's decision to grant TESI's Motion to Alter or Amend Judgment, and to add the clarifying language contained in the *Amended Order,* makes it clear that the Court did not intend to reverse the Commission's findings on operating margin or required annual revenue. The Circuit Court invited reference to the transcript of the hearing if any party had a question regarding why the Court added the sentence stating that it was making no finding with respect to operating margin. *Transcript of October 24, 2005 Circuit Court Hearing*, p. 12. The following interchange at that hearing makes the meaning of the Court's amendment completely clear:

> MR. BEACH: . . . I think what Mr. Ellerbee [sic] will argue is that you have reverse[d] the commission's finding on 20 percent and you left it open to the commission.
>
> THE COURT: If he does that he would be one, in error and two, intellectually dishonest to do that. I mean, I just said and Mr. Ellerbee [sic] agrees I made no finding with respect to the operating margin.

Id., p. 9, ll. 16 – 24.

It is therefore certain that the Circuit Court did not intend to reverse the Commission's primary (and only) rulings on required operating margin and annual revenue. Even if the Circuit Court had attempted to reverse these rulings, *Brunson* holds that the Circuit Court, by operation of law, would have had no authority to do so.

For these reasons, the Commission must now implement fair and reasonable rates that provide TESI with the opportunity to earn a 20% operating margin, and $621,424 annual revenues. The Commission's Phase 3 rates accomplish this requirement.

B. The evidence in this proceeding does not support a change in the operating margin and annual revenue requirement that the Commission has twice found to be fair and reasonable.

The Commission must continue to adhere to the same operating margin that it has already twice found in this case to be fair and reasonable. The Commission made these findings and conclusions after carefully assessing all of the evidence in this proceeding. Here on remand, when the Panel reviews the exact same evidence that led it to those conclusions in September 2004 and January 2005, it must again reach the same conclusions. It would be arbitrary and capricious to now reach a different conclusion.

The evidence that led to these findings in the initial proceeding is identical now, and has not changed. It is axiomatic that any decision on remand must be supported by record evidence (which must be cited in the Order on Remand). See, *Hamm v. South Carolina Public Service Commission*, 309 S.C. 282, 289, 422 S.E.2d 110, 114 (S.Ct., 1992) ("*Hamm*") ("The Commission must set forth findings which are sufficiently detailed to enable the reviewing court to determine whether the findings are supported by the evidence and whether the law has been properly applied to those findings [citing *Able Communications v. South Carolina Public Service Commission*, 290 S.C. 409, 351 S.E.2d 151 (1986)].)

The Commission's *First Order on Remand* correctly stated that the decision on remand must be made on the existing record. To be clear, not only must any new or different operating margin or required annual revenue finding be supported by record evidence, but *any actual Commission decision to change its prior ruling on these issues* must be supported by record

evidence. The record is void of any evidence that would support a decision to now *change* operating margin and required annual revenues.

All of this is consistent with the preceding discussion on "law of the case." In *Nelson v. Charleston and Western Carolina Railway Company*, 231 S.C. 351, 98 S.E.2d 798 (1957), the court noted:

> Of course, the doctrine of "the law of the case" has no application where the facts relating to the question decided are substantially different on a second appeal. *In order to escape the application of the doctrine, however, there must be a material change in the evidence.* [emphasis added]

This holding in *Nelson* applies with equal force here, where there clearly has been no material change (or any change, for that matter) in evidence. Thus, the single rate required by the Circuit Court on remand must be based upon the Commission's findings of 20% operating margin and $621,424 required annual revenue.

C. The record evidence in this proceeding continues to fully support the Commission's primary ruling on TESI's operating margin and annual revenue requirements.

For the reasons set forth above, a ruling on remand based upon a *de novo* review of the record in this proceeding is inappropriate, unnecessary, and unlawful. However, such a review would still yield a fair and reasonable operating margin of at least 20%, and required annual revenues of at least $621,424.

In this case, only two parties presented testimony recommending test year expenses: the Commission Staff[1] and TESI. Commission staff testified to operating expenses for the test year, under then-present rates and after accounting and pro forma adjustments and adjustments for known and measurable out-of-test year occurrences ("adjusted test year operating expenses"), of $425,629. *Surrebuttal Testimony of William O. Richardson, Exhibit No. 2, Tr. Vol. 3*, pp. 97,98. TESI testified to adjusted test year operating expenses of $535,872. *Tr. Vol 2*, p. 213. In the *Main Order,* the Commission adopted the Staff's recommendation in its entirety. *Main Order,*

[1] Since the Commission's hearing in this proceeding, 2004 Act No. 175 went into effect. Among other things, that Act created the Office of Regulatory Staff ("ORS") and transferred the role of the Commission Staff with regard to accounting testimony in utility rate proceedings to the ORS.

pp. 5, 10-27. Upon reconsideration, the Commission changed its accounting treatment of enhancement fees, and therefore modified its approved test year expenses by adding $3,377 in depreciation expense and $4,195 in interest expense. *Order on Reconsideration*, p. 6 The Commission's findings regarding adjusted test year operating expenses must therefore be no greater than $535,872, and no less than $425,629, plus the enhancement fee accounting adjustments.

Only TESI offered testimony regarding what a fair and reasonable operating margin should be. TESI witness Gary Shambaugh testified that if the Commission adopted the Staff's adjusted test year operating expenses (which the Commission did), TESI must have an 18% to 20% operating margin *just to break even. Tr. Vol. 2*, pp. 209, 250-251. Mr. Shambaugh went on to testify that 25% "starts to become - - to get into the realm of reasonableness" *Id.*, p. 253, and that TESI must earn a 31.71% operating margin at the Staff's adjusted test year operating expenses in order for TESI to be financially viable. *Id.*, p. 209, *(TESI Rebuttal Exhibit No. 5)* and 253. Neither the Staff nor any other party offered any testimony regarding what an appropriate or necessary operating margin should be for TESI. Based upon Mr. Shambaugh's testimony, the Commission ruled that 20% operating margin was fair and reasonable.

In *Hamm*, the Commission had found that 13.25% was a fair rate of return for SCE&G. The Supreme Court reversed, finding that because the record only contained testimony of fair rate of return ranging from 12% to 13%, the Commission's finding of 13.25% was not supported by substantial evidence in the record. *Id.*, 309 S.C. 282, 287-288, 422 S.E.2d 110, 113-114. The Commission's ruling in this case that the fair operating margin here is 20% was not within the range of fair and reasonable operating margins contained in the record. In spite of this, TESI believes that, pursuant to the *Brunson* holding, the Commission's ruling is now the law of the case. See, *Buckner v. Preferred Mut. Ins.Co.*, 255 S.C. 159, 161, 177 S.E.2d 544, 544 (1970) (An unchallenged ruling, "*right or wrong*, is the law of the case . . . ." [emphasis added]) If the Commission disagrees with TESI's position, then, pursuant to *Hamm,* the Commission must adopt a new operating margin of between 25% and 31.71% in order for its ruling to be supported by substantial evidence in the record.

Again TESI was the only party to offer testimony regarding the amount of revenue that was required, necessary, and reasonable for TESI's South Carolina operations. In that regard, Mr. Shambaugh testified that TESI must have rates that allow it the opportunity to earn annual

revenues of $802,435. The Commission Staff proposed certain adjustments to TESI's calculation, and testified that TESI was actually testifying to required annual revenues of $788,433. *Testimony of Bill Richardson, Utilities Department Exhibit No. 2.* TESI witness Shambaugh accepted the Staff's adjustments, and agreed that TESI was testifying to the need for $788,433 in annual revenue. *Rebuttal Testimony of Gary Shambaugh, TESI Rebuttal Exhibit No. 5, Tr. Vol. 2.* pp. 208,209. The Commission initially ruled that $609,624 annual revenue was required for TESI's South Carolina operations. *Main Order*, pp. 5, 30, 31, 34, 35. The Commission increased this revenue requirement to $621,424 after modifying its accounting treatment of enhancement income. *Order on Reconsideration*, p. 7.

Like the Commission's findings regarding operating margin, the Commission's ruling on required annual revenue was not within the range of required annual revenue contained in the record. Even so, TESI believes that, *right or wrong*, the Commission's ruling on required annual revenue is now the law of the case, pursuant to the holding in *Brunson*. If the Commission disagrees with TESI's application of *Brunson* to this case, then it must adopt a new required annual revenue that is supported by the record evidence, which solely consists of Mr. Shambaugh's testimony on this point.

D. The Foxwood Hills customers have now received substantially all of the monetary benefit that the Commission sought to bestow upon them through the phased rates.

By the time TESI is able to begin earning Phase 3 rates under the current remand, the customers will have received essentially all of the monetary benefit that the Commission intended to provide to them from the phased rates. Put another way, if the Commission's decision meant TESI is entitled to earn 20%, but only *after* giving customers the monetary benefit of the lower Phase 1 and 2 rates, *that is essentially where we are today.*

Even though the Commission *Orders* allowed TESI to shift to Phase 2 on December 1, 2005, the circuit court made that impossible by remanding this case to the Commission just before that rate increase was to occur. Because of the Court's remand, TESI was unable to increase its rates to Phase 2 on December 1. Consequently, TESI is still today charging Foxwood customers under Phase 1 rates.

Based upon the phased-in rate schedule, TESI would have had the opportunity to earn $981,754 during the 26 months between the implementation of Phase 1 under the Commission's first order and the December 1, 2006 implementation of Phase 3. (See,**Exhibit 1,** attached, p. 1) If the Commission had immediately implemented TESI's ultimate Phase 3 rates, TESI would have earned $1,344,444 during that same period. Thus, by phasing TESI's rates in over 26 months, the Commission intended to dampen the effects of this necessary rate increase by saving Foxwood customers $362,690.

If, following the Commission's order on remand, TESI is able to implement its Phase 3 rates on May 1, 2006, then TESI will have earned $999,954 between issuance of the *Main Order* and December 1, 2006. (**Exhibit 1,** p. 2). Under this scenario, the Foxwood customers will receive $344,490 of the original $362,690 savings (all but $18,200). Thus, a May 1, 2006 implementation of the 20% operating margin will give Foxwood customers more than 95% of the total benefit this Commission intended to provide to them through the phased rates.

If TESI is not able to implement its 20% rates until June 1, 2006, the Foxwood customers will have saved the exact same amount, $362,690, the Commission intended for them to save under the phased rates. *(Id.)*

While the customers of Foxwood Hills have received the benefit of almost two years of very low Phase1 rates, TESI has operated during this entire period at a 7.75% annual *loss*. In order to avoid compounding this already inequitable result, the Commission should now implement permanent rates that reflect the operating margin and annual revenues this Commission has twice found to be fair, reasonable, and necessary for TESI's operations.

III. Conclusion

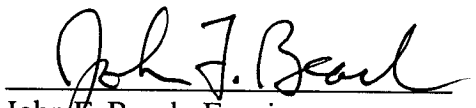
It is clear that the Commission must now either adhere to its primary rulings on operating margin and required annual revenue, or modify those rulings consistent with the record evidence to increase operating margin and annual revenue. The record is completely void of evidence that would support any other ruling.

For all of these reasons, TESI urges the Commission to either

1) allow TESI to immediately implement rates that provide the opportunity to earn annual revenues of $621,424, and the 20% operating margin, or

2) adopt a new fair and reasonable operation margin between 25% and 31.71%, consistent with the only record evidence in this proceeding, and allow TESI to implement rates that provide the opportunity to earn corresponding annual revenues.

Respectfully submitted,



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Columbia, South Carolina
March 15, 2006

MONETARY BENEFIT TO TESI CUSTOMERS FROM PHASED RATES

Charges to Customers Under Phased Rates - As Ordered

Ph. 1a	October 1, 2004 – November 30, 2004	$ 33,257/mo x 2 =	$ 66,514
Ph. 1b	December 1, 2004 – November 30, 2005	$ 33,585/mo x 12 =	$ 403,020
Ph. 2b	December 1 2005 – November 30, 2006	$ 42,685/mo x 12 =	$ 512,220
		Total	**$ 981,754**

Charges to Customers - In Absence of Phased Rates

Ph. 3a	October 1, 2004 – November 30, 2004	$50,802/mo x 2 =	$ 101,604
Ph. 3b	December 1, 2004 – November 30, 2006	$51,785/mo x 24 =	$1,242,840
			$1,344,444

Total Monetary Benefit to Customers from Phase Rates

	$1,344,444
-	$,981,754
	$ 362,690

Note: Phase "1a, 2a, and 3a" designates rates from Order No. 2004-434 (Main Rate Order) Phase "1b, 2b, and 3b" designates rates from Order No. 2004-574 (Order on Reconsideration)

MONETARY AFFECT ON TESI CUSTOMERS

IMPLEMENTATION OF *PHASE 3b* RATES

Actual Charges to Customers
With May 1, 2006 Implementation of Phase 3b

Ph. 1a October 1, 2004 – November 30, 2004	$ 33,257/mo x 2	= $	66,514
Ph. 1b December 1, 2004 – November 30, 2005	$ 33,585/mo x 12	= $	403,020
Ph. 1b December 1, 2005 – April 30, 2006	$ 33,585/mo x 5	= $	167,925
Ph. 3b May 1, 2006 – November 30, 2006	$ 51,785/mo x 7	= $	362,495
	Total	**$**	**999,954**

Charges to Customers, actual	$	999,954
Charges to Customers under phased rates, as ordered:	- $	981,754
Difference in benefit between Actual and As Ordered:	**$**	**18,200**

Actual Charges to Customers
With June 1, 2006 Implementation of Phase 3b

Ph. 1a October 1, 2004 – November 30, 2004	$ 33,257/mo x 2	= $	66,514
Ph. 1b December 1, 2004 – November 30, 2005	$ 33,585/mo x 12	= $	403,020
Ph. 1b December 1, 2005 – May 31, 2006	$ 33,585/mo x 6	= $	201,510
Ph. 3b June 1, 2006 – November 30, 2006	$ 51,785/mo x 6	= $	310,710
	Total	**$**	**981,754**

Charges to Customers, actual	$	981,754
Charges to Customers under phased rates, as ordered	- $	981,754
Difference in benefit between Actual and As Ordered:	**$**	**0**